

NTSB Order No. EA-4228

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD  
at its office in Washington, D.C.  
on the 5th day of August, 1994

Respondent .

Docket SE-13068

<sup>1</sup>An excerpt from the hearing transcript containing the oral initial decision is attached.

91.13(a) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91).<sup>2</sup> Nevertheless, the law judge found that the Administrator's 30-day suspension of respondent's commercial pilot certificate was not warranted because the violations were "technical in nature," and concluded that no sanction should be imposed.

In his appeal, the Administrator argues that the law judge reduced the sanction in error and that the 30-day suspension order should be reinstated.<sup>3</sup> After consideration of the briefs of the parties and the record, the Board concludes that safety in air commerce or air transportation and the public interest require affirmance of the Administrator's order. For the reasons that follow, we grant the appeal.

On November 21, 1992, respondent was pilot-in-command of Empire Airlines Flight 60, a Cessna 208, on a flight from Spokane to Yakima, Washington. This was a cargo-carrying flight that

---

<sup>2</sup>Respondent did not appeal this finding.

Sections 91.123(b) and 91.13(a) state, in pertinent part:

**§ 91.123 Compliance with ATC clearances and instructions.**

\* \* \* \*

(b) Except in an emergency, no person may operate an aircraft contrary to an ATC instruction in an area in which air traffic control is exercised.

**§ 91.13 Careless or reckless operation.**

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

<sup>3</sup>The Administrator filed an appeal brief; respondent filed a brief in reply.

came in to Yakima about the same time every morning. (Transcript (Tr.) at 59.) Because Yakima airport is a non-radar facility, the controllers must rely on pilot reports of aircraft positions in order to achieve separation between aircraft. It was snowing that day, with visibility reported at 3/8ths of a mile. This was respondent's first time flying in snow. (Tr. at 133.)

When respondent contacted Yakima approach, the following exchange took place (time is coordinated universal time (UTC)):

1650:29 CFS60 Yakima approach good morning this is Empire sixty with you six thousand on the localizer with ah foxtrot

1650:35 A/C Empire sixty Yakima approach good morning maintain six thousand until glide slope intercept cleared straight in ILS runway two seven approach contact the tower one one eight point four Donny<sup>4</sup> inbound

1650:48 CFS60 Okay we're intercepting the glide slope start down and we'll inter ah talk to the tower at Donny for Empire sixty

1650:55 A/C Empire sixty runway two seven RVR two thousand six hundred ah visibility three eighths of a mile and ah breaking action on the runway has been reported fair to poor by a vehicle poor by a Navajo and you can expect ah one inch of snow and anywhere from one quarter to two and a half inches of slush on the runway

1651:13 CFS60 Empire sixty sounds like fun thank you sir

1651:17 A/C And Empire sixty also for ya the ah previous aircraft have ah got the field in sight right at minimums in the event you do a missed approach your alternate missed approach will

---

<sup>4</sup>Donny is the outer marker. It is about seven miles from the threshold of runway 27. (Tr. at 16.)

be a right turn direct Donny maintain four thousand

1651:30 CFS60 Right turn direct Donny maintain four thousand Empire sixty

1653:19 A/C Empire sixty ah weather just come out showing indefinite ceiling five hundred sky obscured ah still three eighths of a mile ah light snow and fog

1653:27 CFS60 Empire sixty thank you

1655:40 A/C Empire sixty say DME

1655:43 CFS60 Empire sixty is ah one point six just passing the VOR and we're just startin' to see the ground from here about twenty two hundred

1655:49 A/C Empire sixty did you forget to contact the tower at Donny

1655:52 CFS60 Oh sorry about that Empire sixty

Administrator's exhibit C-1.

Jay Bagwell, who was working the approach control position, testified that when he heard the local controller clear a Navajo aircraft for takeoff from runway 27, he asked the local controller whether he had heard from Empire 60 yet. Since he had not, Mr. Bagwell asked respondent for his location. Respondent answered as stated above, then at 1655:55, informed local control that he was already "inside of Donny."<sup>5</sup> Local control instructed the Navajo to exit the runway and cleared Empire 60 to land.

Respondent testified that the typical approach speed for this aircraft in good weather conditions is 120 knots, but faster in icy conditions. (Tr. at 243.) Coming in outside the outer marker, respondent's speed was between 160 and 170 knots, by his

---

<sup>5</sup>See infra, n. 6.

own estimation. (Tr. at 247.) In response to the question of what happened at Donny, he replied that, although he did not remember exactly, there was a lot of activity at the time. He was trying to slow the aircraft down a bit while remaining focused on the adverse weather and deciding if the weather conditions were below the minimum requirements. This was the first time he had ever attempted an ILS approach in snow. It was impossible to contact the tower at Donny, he maintains, because the controller was giving him a weather update at the time. Even after switching frequencies, he was unable to talk to the tower right away since the local controller was "in the middle of giving a dissertation to the Navajo about someone that had forgotten to report the outer marker, so I had to wait." (Tr. at 251-52.)<sup>6</sup> He then explained that, given the rough weather, he

---

<sup>6</sup>According to the transcript, this communication involving local control occurred as follows:

1655:20	39C	Ah tower Navajo three niner charlie's ready for take off
1655:23	LC	Navajo three five three niner charlie Yakima tower runway two seven RVR two thousand eight hundred cleared for take off
1655:28	39C	Three nine charlie
1655:55	CFS60	Empire sixty is with you inside of Donny
1656:02	LC	Navajo three nine charlie taxi down the runway to the north south and exit the runway aircraft on the approach forgot to call me at the marker
1656:08	39C	Three nine charlie --- we can get off right here ---
1656:10	CFS60	---(unintelligible) sixty inside Donny

thought he had already told the tower that he had passed Donny.<sup>7</sup>  
(Tr. at 257-58.)

Respondent argued that he was instructed to "contact" at, not "report," the outer marker. Although the latter would have conveyed a sense of urgency, the former did not and, as such, there was no time limit in which he had to respond. He maintained that the local controller should have asked respondent's position before clearing the Navajo to depart because he should have anticipated that respondent would have been at Donny by then.

The law judge made a factual finding that respondent received the weather updates when he was over the outer marker and that the updates continued until he was at least 2½ miles  
(..continued)

1656:11 LC Empire sixty what's your DME now

1656:13 CFS60 Ah we're two point three past the VOR got ground contact

Administrator's Exhibit C-1.

Local control's communication at 1656:02 to the Navajo occurred **after** respondent's first transmission and was not of an unusually long duration. The controller was talking to respondent within a few seconds.

<sup>7</sup>The law judge asked respondent why he did not call in during the one minute and 53 seconds when no communication occurred on either frequency. (At 1653:27, respondent thanked the approach controller for the weather update and at 1655:20, the Navajo reported to local control that he was ready for takeoff.) In answer to the law judge's question, respondent stated that where he's from, he's used to being handed off a lot earlier, outside the outer marker. This, combined with the severe weather conditions, led him to believe (albeit erroneously) that he had already contacted the tower at or near Donny. (Tr. at 256-58.)

beyond Donny. He further found that, while respondent "inadvertently failed to notify local control" when he passed the outer marker, local control cleared the Navajo for takeoff despite the knowledge that respondent's aircraft was headed in towards runway 27. Based on these conclusions, the law judge determined that, although respondent violated FAR sections 91.123(b) and 91.13(a), the violations were technical and, therefore, no sanction should be imposed.

On appeal, the Administrator argues that, under Administrator v. Muzquiz, 2 NTSB 1474 (1975), and its progeny, a law judge must justify any reduction in sanction by clear and compelling reasons: this was not done here. All the charges in the suspension order were proven and, the Administrator asserts, were not technical in nature. Consequently, he continues, the law judge erred in imposing no sanction.

The Board has recently explained that sole reliance on Muzquiz may be less than adequate to sustain sanction. Administrator v. Stimble, NTSB Order No. EA-4177 (1994); Administrator v. Tweto, NTSB Order No. EA-4164 (1994). Under the Civil Penalty Assessment Act of 1992, the NTSB's discretion to alter the Administrator's choice of sanction operates within the confines of the Administrator's validly adopted interpretations of publicly-available written agency policy.<sup>8</sup>

---

<sup>8</sup>See section 609(a) of the Federal Aviation Act, 49 U.S.C. app. § 1429(a), which, as amended by the Civil Penalty Assessment Act, states, in pertinent part:

In the conduct of its hearings under this

The Administrator contends that the violations at issue in the instant case cannot be characterized as merely technical because technical violations, such as bookkeeping errors or an airman's failure to have his certificate in his personal possession, generally are non-operational and do not represent a safety hazard. See Administrator v. Wright, 5 NTSB 931 (1986). We agree. The law judge found that respondent was instructed to contact the tower at Donny, acknowledged the instruction, but inadvertently failed to notify local control that he had passed Donny. Notwithstanding the law judge's unexplained view that respondent's violation was merely technical, we think it plainly jeopardized safety. ATC, which had no independent means of determining respondent's location as he approached the airport, obviously could not safely dispatch the Navajo without accurate information as to respondent's progress toward the same runway. Respondent's failure to call in at the outer marker deprived ATC of such information and created uncertainty even as to the safety of allowing the Navajo to remain on the runway. We do not concur in the law judge's apparent belief that respondent's violation

(..continued)

subsection, the [National Transportation Safety] Board shall not be bound by any findings of fact of the Administrator but shall be bound by all validly adopted interpretations of laws and regulations administered by the Federal Aviation Administration and of written agency policy guidance available to the public relating to sanctions to be imposed under this subsection unless the Board finds that any such interpretation is arbitrary, capricious, or otherwise not in accordance with law. The Board may, consistent with this subsection, modify the type of sanction to be imposed from suspension or revocation of a certificate to assessment of a civil penalty.



was technical because any endangerment it created could have been avoided if one of the controllers had asked respondent's location before clearing the Navajo for takeoff.<sup>9</sup> The issue is not whether ATC could have done more, or something different, to avert the hazard respondent created, but whether respondent's conduct produced an endangerment that would not have existed had he complied with ATC's instruction. It clearly did.

The Administrator did not offer evidence of written sanction policy guidelines, so we must look to Board precedent which reveals that a 30-day suspension is a usual sanction for operating an aircraft contrary to ATC instruction. See, e.g., Administrator v. Bennett, NTSB Order No. EA-4124 (1994) (30 days); Administrator v. Dautel, NTSB Order No. EA-3996 (1993) (30 days); Administrator v. Wolfenbarger, NTSB Order No. EA-3684 (1992) (20 days); Administrator v. Peretti, NTSB Order No. EA-3647 (1992), aff'd, 999 F.2d 548 (1993) (30 days).<sup>10</sup>

Based on the foregoing, we find that the law judge erred in eliminating the sanction sought by the Administrator and we reinstate the original suspension.

---

<sup>9</sup>We note, in this connection, that respondent's own expert witness, a former controller, said that, in his opinion, the local controller did not do anything wrong. (Tr. at 210.)

<sup>10</sup>See also Administrator v. Eden, NTSB Order No. EA-3932 (1993); Administrator v. McKinley, NTSB Order No. EA-3275 (1991). Both involve emergency revocations of airman certificates for acts of deliberately ignoring ATC instruction.

**ACCORDINGLY, IT IS ORDERED THAT:**

1. The Administrator's appeal is granted;
2. The initial decision is reversed with respect to sanction;
3. The Administrator's order is affirmed; and
4. The 30-day suspension of respondent's airman certificate shall begin 30 days after service of this order.<sup>11</sup>

HALL, Acting Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

---

<sup>11</sup>For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).